IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5420

THEODORE PAYTON,

Appellant,

vs.

NEW YORK,

Appellee.

No. 78-5421

OBIE RIDDICK,

Appellant,

vs.

NEW YORK,

Appellee.

APPEALS FROM THE NEW YORK
COURT OF APPEALS

BRIEF FOR THE APPELLANTS

WILLIAM E. HELLERSTEIN
DAVID A. LEWIS
Counsel for Appellants
The Legal Aid Society
15 Park Row — 18th Floor
New York, New York 10038
[212] 577-3420

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

INDEX

CITATIONS

CONSTITUTION AND STATUTES:

MISCELLANEOUS:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5420

THEODORE PAYTON,

Appellant,

vs.

NEW YORK,

Appellee.

No. 78-5421

OBIE RIDDICK,

Appellant,

vs.

NEW YORK,

Appellee.

APPEALS FROM THE NEW YORK
COURT OF APPEALS

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the New York Court of Appeals (A. 69-93) is reported at 45 N.Y.2d 300, 408 N.Y.S.2d 395. The order of affirmance of the Appellate Division, First Department in the *Payton* case (A. 42) is reported at 55 A.D.2d 859. The opinion of the Supreme Court, New York County in the *Payton* case on the pretrial motion to suppress evidence (A. 39-41) is reported at 84 Misc.2d 973, 376 N.Y.S.2d 779. The decision of the Appellate Division, Second Department in the *Riddick* case (A. 67-68) is reported at 56 A.D.2d 937, 392 N.Y.S.2d 848. The opinion of the Supreme Court, Queens County in the *Riddick* case denying the motion to suppress evidence (A. 63-66) is unreported.

JURISDICTION

The judgment of the Court of Appeals in both cases was entered on July 11, 1978. In the *Payton* case, a notice of appeal to this Court was filed on September 12, 1978. In the *Riddick* case, a notice of appeal was filed on September 14, 1978. Both appeals were docketed on September 19, 1978. Probable jurisdiction in both cases was noted on December 11, 1978, and the cases were consolidated.[1] The jurisdiction of the Court rests on 28 U.S.C. §1257(2).

[1] In the *Payton* case, the Court noted probable jurisdiction "limited to Question 1 presented by the jurisdictional statement." (A. 97).

QUESTION PRESENTED

Whether New York statutes which even in the absence of exigent circumstances authorize warrantless, non-consensual and forcible entries for the purpose of arresting a person in his home violate the Fourth and Fourteenth Amendments.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Payton: Former New York Code of Criminal Procedure §§177, 178 (66 McKinney's Laws of New York, Ch. 4):

CHAPTER IV—ARREST BY AN OFFICER WITHOUT A WARRANT

* * *

§177. *In what cases allowed.*

A peace officer may, without a warrant, arrest a person,

1. For an offense, committed or attempted in his presence, or where a police officer as enumerated in section one hundred fifty-four-a of the code of criminal procedure, has reasonable grounds for believing that an offense is being committed in his presence.

2. When the person arrested has committed a felony, although not in his presence;

3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it;

4. When he has reasonable cause for believing that a felony has been committed, and that the person arrested has committed it, though it should afterward appear that no felony has been committed, or, if committed, that the person arrested did not commit it;

5. When he has reasonable cause for believing that a person has been legally arrested by a citizen as provided in sections one hundred eighty-five, one hundred eighty-six and one hundred eighty-seven of this code.

§178. *May break open a door or window, if admittance refused.*

To make an arrest, as provided in the last section, the officer may break open an outer or

inner door or window of a building, if, after notice of his office and purpose, he be refused admittance.

Riddick: New York Criminal Procedure Law, §§150.10(1)(a)(b), 140.15(1)(4), 120.80(1)(4)(5) (11A McKinney's Laws of New York, 1971):

§140.10. *Arrest without a warrant; by police officer; when and where authorized.*

1. Subject to the provisions of subdivision two, a police officer may arrest a person for:

(a) Any offense when he has reasonable cause to believe that such person has committed such offense in his presence; and

(b) A crime when he has reasonable cause to believe that such person has committed such crime, whether in his presence or otherwise.

§140.15. *Arrest without a warrant; when and how made by police officer.*

1. A police officer may arrest a person for an offense, pursuant to section 140.10, at any hour of any day or night.

* * *

4. In order to effect such an arrest, a police officer may enter premises in which he reasonably believes such person to be present, under the same circumstances and in the same manner as would be authorized, by the provisions of subdivisions four and five of section 120.80, if he were attempting to make such arrest pursuant to a warrant of arrest.

§120.80. *Warrant of arrest; when and how executed.*

1. A warrant of arrest may be executed on any day of the week and at any hour of the day or night.

* * *

4. In order to effect the arrest, the police officer may, under circumstances and in a manner prescribed in this subdivision, enter any premises in which he reasonably believes the defendant to be present. Before such entry, he must give, or make reasonable effort to give, notice of his authority and purpose to an occupant thereof, unless there is reasonable cause to believe that the giving of such notice will:

(a) Result in the defendant escaping or attempting to escape; or

(b) Endanger the life or safety of the officer or another person; or

(c) Result in the destruction, damaging or secretion of material evidence.

5. If the officer is authorized to enter premises without giving notice of his authority and purpose, or if after giving such notice he is not admitted, he may enter such premises, and by a breaking if necessary.

STATEMENT

Payton: No. 78-5420

On the morning of January 12, 1970, Roberto Carassas, the manager of a gas station at 1995 First Avenue on Manhattan's upper East Side, was shot and killed during a robbery. The perpetrator had carried a rifle and had worn a ski mask. On January 16, appellant Payton surrendered himself at Manhattan's

23rd precinct and was placed under arrest for that crime. On March 30, 1970, Payton was indicted by a New York County Grand Jury for felony murder and intentional murder (A. 2).

On May 16, 1974, a pretrial hearing was held on Payton's motion to suppress physical evidence seized by the police from his apartment on January 15, 1970. The sole witness was Detective Mal Malfer, the officer who, on January 12, 1970, was placed in charge of the investigation.

Malfer testified that sometime in the early morning of January 12, 1970, he proceeded to the service station where Mr. Carassas had been shot and there interviewed several witnesses; he also spoke to witnesses who were not at the scene (A. 10, 11). On January 14, Malfer was told by "witnesses" that a "Teddy Payton" was the perpetrator (A. 11, 21). That same day, Malfer was taken by one of the witnesses to the Bronx and the building and apartment in which Payton lived (682 East 141st Street, apt. 5-C) was pointed out to him (A. 34).[2] However, Malfer took no steps that day to effect Payton's arrest; nor did he make any effort to obtain either an arrest or search warrant (A. 21, 34).

Instead, Detective Malfer, accompanied by a police sergeant and three other detectives, returned to Payton's apartment between 7:15 and 7:30 a.m. the

---

[2]The record of the suppression hearing does not establish at precisely what time on January 14, Malfer learned where Payton lived because the prosecutor's objection to that question was sustained (A. 33). There was trial testimony, however, that Payton's apartment had been pointed out to Malfer sometime after twelve noon by Jessie Leggett, a prosecution witness (T. 782-783). [References to pages in the record which are not in the Appendix are preceded by the letter "T."].

next day (January 15)[3] (A. 12). He could not recall whether he had made any attempt to ascertain whether Payton was home prior to going to the apartment (A. 23). When the five police officers arrived at Payton's apartment door, Malfer saw a light from beneath the bottom of the door and heard the sound of music from a radio (A. 12, 23, 24). They knocked on the door but received no response (A. 13, 14). The officers tried to force their way in, but could not because the door was made of metal. Consequently, one of the officers left the building to call the Police Department's Emergency Services Division for assistance; Malfer could not recall how long it was before help arrived (A. 14, 24-26).[4]

Malfer testified further that while waiting for the arrival of help from Emergency Services, he had not been concerned about the possibility of escape because he assumed that he and his fellow officers had followed their normal course of covering all avenues of escape: "I assume if we worked the way we normally worked that we had that situation covered" (A. 25). When two officers from Emergency Services arrived, they broke Payton's door open with crowbars. Payton was not at home but upon entering the apartment, the officers divided up and went into different rooms (A. 27, 28).

Although Malfer maintained that their search of the

[3]When defense counsel attempted to learn from Malfer whether, after leaving Payton's building on the 14th, and prior to his return to Payton's apartment the following morning, Malfer had acquired any further information, the prosecution objected and the court sustained the objection (A. 34).

[4]At trial, Malfer testified the time lapse was about a half-hour (T. 901).

apartment was directed at finding Payton, he admitted that, even after he realized Payton was not there, he and his brother officers conducted a search of the entire apartment during which they opened dressers and closets, looked under a mattress and inside cupboards and dumped out the contents of various drawers (A. 28-30). As a result of his search of a closet, Malfer found a shotgun, a bandolier containing fourteen buckshots for that gun, several photographs of Payton with a ski mask, and a sales receipt for the purchase of a Winchester rifle (A. 5, 15). The prosecution conceded that all of these items should be suppressed because they were the fruits of the warrantless search of Payton's apartment (A. 3-7).

However, Malfer also claimed that after he had been in the apartment for a while he saw a .30 caliber Winchester shell casing, which he said was in "plain view" on top of a stereo set, and seized it (A. 15, 32). Defense counsel argued that the police had sufficient time to procure a warrant and that the "plain view" of the casing did not "sanitize" the unlawful entry (A. 8). The prosecution maintained that the police were properly in the apartment to make an arrest authorized by statute (A. 4).

On June 4, 1974, the court rendered a decision in which it suppressed all of the items taken from the apartment except the .30 caliber shell casing. The court held that the casing had been observed in "plain view" while the police were lawfully in the premises pursuant to sections 177 and 178 of the former New York Code of Criminal Procedure (the applicable statute)[5] to

[5]The Court of Appeals noted that the substance of sections 177 and 178 was "continued and expanded in sections 140.10, 140.15 (subd. 4) and 140.25 (subds. 1-3) of the present statute" (A. 77, n.3).

make a warrantless arrest for a felony which they had reasonable grounds to believe Payton had committed (A. 39-41).

On June 6, 1974, Payton's trial commenced before Justice Peter McQuillan and a jury. The prosecution presented testimony from six eyewitnesses at the scene of the crime, two of whom, Melvin Gittens and Raymond Williams, claimed they could recognize Payton because of their prior acquaintance with him although the robber had worn a mask (Gittens: T. 285-286, 306-318, 365, 393-394; Williams: T. 492, 494, 516-522, 570-573, 590-592). Another witness, Jesse Leggett, testified that Payton admitted to him that he had committed the crime and also testified to Payton's purchase and possession of a .30/30 Winchester rifle (Leggett: T. 665-668, 670, 676-677, 733-734, 740).[6] The prosecution also called Sidney Roseman, a Peekskill, New York gunstore owner who testified from his records that Payton had purchased a .30/30 Winchester rifle from him on November 19, 1969 (T. 593-

[6]Gittens, Williams and Leggett all had extensive criminal records. In fact, Gittens had come to the service station for a prearranged meeting with his lawyer to work out the means for arranging his surrender to the police on a homicide charge. He had also been previously convicted of sodomy (T. 294, 305, 319-321, 324-325, 339-348). Williams had four prior felony convictions, the most recent of which had been for attempted murder of a police officer. At the time of trial, he was serving a 10 year sentence and was scheduled to see the Parole Board within a few months (T. 490, 499-500, 533-569). Leggett had prior convictions for various assaults, theft and gambling offenses. At the time of trial, he was facing attempted murder charges for shooting his mother-in-law (T. 672-674, 688-689, 693-696, 743-745, 769-770, 790-792).

597, 600, 603, 949-951).[7]

Although the prosecution established that the deceased had been killed by bullets fired from a .30 caliber Winchester rifle (T. 881-883), the murder weapon was never recovered (T. 849). However, the .30 caliber shell casing seized in Payton's apartment was placed in evidence [People's Exhibit 12] (T. 819-825) as were two shell casings found near the body of the deceased on the floor of the service station (T. 807-813); the prosecution's ballistics expert testified that all three had been fired from the same Winchester rifle (T. 1012-1015, 1021-1022). No defense witnesses were called.

On June 21, 1974, the jury found Payton guilty of felony murder but were unable to agree on the intentional murder count (T. 1304-1305).[8] On October 29, 1974, the court sentenced Payton to a term of 15

[7]The defense challenged Roseman's testimony and the admissibility of the original Firearm Transaction Record (People's Exhibit 5) which Roseman had retained as the "tainted" fruit of the bill of sale found by Detective Malfer in Payton's apartment and which had been suppressed prior to trial. At a post-trial taint hearing, Justice McQuillan ruled that the prosecution had established by a preponderance of the evidence that by following routine police procedures, the police would have discovered the Firearm Transaction Record on their own. By 4-3 vote, the Court of Appeals upheld that ruling under the doctrine of inevitable discovery (A. 78-80). Review of that ruling by this Court was sought in questions 2 and 3 of Payton's Jurisdictional Statement but those questions are not before the Court because of its limitation of review to question 1 (A. 97).

[8]The case was submitted to the jury at 2:45 p.m. on June 20, 1974 and the verdict was not rendered until 6:10 p.m. on June 21. The jury interrupted its deliberations to request re-readings of various portions of the testimony of Leggett, Williams, Gittens and Gittens's lawyer and to request supplemental instructions on reasonable doubt and intentional murder (T. 1217-1267).

years to life imprisonment. The Appellate Division, First Department affirmed the conviction without opinion on December 16, 1976 (A. 42). The Court of Appeals' decision is discussed at pp. 14-16 *infra*.

Riddick: No. 78-5421

On March 14, 1974, Obie Riddick was arrested in his Queens home on a robbery charge (A. 48-49). In the course of a search incident to that arrest, the police discovered heroin and a hypodermic syringe in a dresser drawer in Riddick's bedroom. On April 16, 1974, Riddick was indicted for criminal possesion of a controlled substance and for criminal possession of a hypodermic instrument (A. 45-46). Prior to trial, Riddick moved to suppress the evidence seized from his apartment on the ground, among others, that the arresting officers had failed to obtain either an arrest or a search warrant although they had ample time to do so (A. 61).

The evidence at the suppression hearing, which consisted entirely of the testimony of Detective Fred Bisogno, the arresting officer, showed that the police first obtained probable cause to arrest Riddick in June, 1973, when he was identified from a photographic array as the perpetrator of two robberies (A. 52, 59).[9] At that time, although Riddick was on parole from an earlier conviction (which did not terminate until February 12, 1974), the police claimed that they did not actually learn Riddick's address until January, 1974

[9]It appears that the robberies in question occurred in 1971, over two years before the arrest (see Arraignment Minutes dated April 25, 1974 at 2; Trial Counsel's Affirmation in Support of Appellant's Motion to Suppress).

when they apparently were informed by his parole officer that he lived at 127-08 165th Street, Queens (A. 51, 53, 67).[10] Even then the police did not try to arrest him; nor did they obtain a warrant for his arrest or a search of his home (A. 53, 59).[11] Instead, they waited six to ten weeks before going to his home to arrest him.

On March 14, 1974, at about noon, three police detectives and Riddick's former parole officer went to Riddick's home, a two-family, wood-frame house (A. 48-49). The parole officer entered the house first then returned and signalled to the police that Riddick was home (A. 53, 58). They knocked on the front door which was opened by Riddick's three-year old son. From the doorway, the police saw Riddick in bed and, without first announcing their authority and purpose, proceeded into the bedroom (A. 49, 54.)[12] The police ordered Riddick, who was clad only in undershorts, out of bed (A. 49-50). They then searched the general area of the bed, beneath the mattress, under the pillow case, and inside a dresser which was a few feet away from the bed (A. 50). In the top dresser drawer, the officers discovered a quantity of heroin and a hypodermic syringe (A. 50). The trial court denied Riddick's motion to suppress these items on the ground that the arrest was lawful because it was based on probable

[10]Riddick had lived at this address for two years (Sentencing Minutes dated September 24, 1974 at 6).

[11]The arresting officer claimed he had tried to get a "grand jury" warrant, an arrest warrant founded upon an indictment, but had failed to do so because Riddick had not yet been indicted (A. 53).

[12]Only two of the officers went into Riddick's bedroom (A. 54). The parole officer was in an adjoining room (A. 50) and the location of the other officer is unclear.

cause and the search was reasonable as incident to the arrest (A. 64-66).

On August 19, 1974, Riddick withdrew his plea of not guilty and pled guilty to criminal possession of a controlled substance in the sixth degree (New York Penal Law §220.06), in full satisfaction of the charges in this indictment (See Plea Minutes dated August 19, 1974). On September 24, 1974, the court sentenced him to a 2½ to 5 year term of imprisonment (See Sentence Minutes dated September 24, 1974). By virtue of New York Criminal Procedure Law, §710.70(2) the denial of Riddick's motion to suppress was appealable notwithstanding his entry of a guilty plea. On appeal, Riddick challenged the constitutionality of New York Criminal Procedure Law §§140.15(4) and 120.80(4),(5) which authorized the warrantless arrest in his home. The Appellate Division, Second Department affirmed his conviction on March 28, 1977 with no majority opinion. One justice dissented on the ground that the police failed to comply with the statutory requirement that notice of authority and purpose be given prior to entry (A. 67-68).

The Court of Appeals' Decision

By a 4-3 vote, the Court of Appeals affirmed the convictions in both cases. The majority held that police entry into a home for the purpose of arrest, "if based on probable cause, is not necessarily violative of the constitutional right to be secure against unreasonable searches and seizures even though the arresting officer has not obtained a warrant and there are no exigent circumstances" (A. 69). Noting that this Court has not yet resolved the issue (A. 78), the majority reasoned

that there "was a substantial difference between the intrusion which attends an entry for the purpose of searching the premises and that which results from an entry for purpose of making an arrest," as well as a "significant difference in the governmental interest in achieving the objective of the intrusion in the two instances." Thus, it concluded, a warrantless entry for a search will be "both more extensive and more intensive," while entry for arrest will be achieved without "accompanying prying into the area of expected privacy attending [a person's] possessions and affairs" (A. 75). While recognizing that "considered decisions in the federal courts have reached the opposite result" (A. 78), the majority believed there was support for its holding in "[t]he apparent historical acceptance in the English common law of warrantless entries to make felony arrests," in the long-time existence of statutory authority in New York and in other jurisdictions and in the adoption by the American Law Institute of a similar rule (A. 76-78).

The dissenters argued that absent exigent circumstances, the police are constitutionally required to have a warrant to enter a home to arrest or seize a person.[13] Writing on the warrant issue, Judge (now Chief Judge) Cooke emphasized that "from the standpoint of the citizen—to whom the language of the Fourth Amendment is directed—it makes little difference whether the invasion of the privacy of his home was made to effect a warantless arrest or a warrantless search" (A. 89), and

[13]Judge Wachtler believed there were exigent circumstances in the *Payton* case because of the seriousness of the crime and because the police had been in "continuous pursuit" but dissented on the inevitable discovery issue (A. 81-85).

that "neither antiquity nor legislative unanimity can be determinative of the grave constitutional question presented here" (A. 92).[14]

SUMMARY OF ARGUMENT

I. The primary interest protected by the Fourth Amendment has always been the privacy of the home. Accordingly, this Court's decisions have long afforded the most stringent protection to the sanctity of private dwellings. The paramount significance of the home in our Constitutional scheme is due to the various meanings the home has for our citizenry. Not only is it a fundamental property interest but, as the center of the personal life of the individual, it is the place in which legitimate expectations of privacy are the highest.

In treating arrests within the home as though they were the same as those made in public places, the Court of Appeals ignored those distinctions between the home and public areas which have long been drawn by this Court. The court erred in holding that the intrusion involved in an entry of the home to arrest is minimal in comparison with that of an entry to search. This error arose from the court's failure to recognize that an entry

[14]Judge Cooke also took specific issue with Judge Wachtler on the existence of exigent circumstances in the *Payton* case, pointing out that the police had been well aware of Payton's identity and address the day before their break-in, that in the intervening period they had ample opportunity to obtain a warrant, and that even on the day of the break-in, they delayed until Emergency Services personnel arrived and thus had yet additional time in which they could have secured a warrant (A. 92).

into the home invades the privacy of all its occupants, that it opens to police scrutiny all items in "plain view," that the manner in which the police enter a dwelling is not designed to ensure a minimal intrusion on privacy, that arrests within the home are accompanied by incidental searches and that if the suspect is not immediately within sight, a search for him may extend throughout the entire premises. When these circumstances are taken into account, the privacy interests implicated in the mere entry of the home are, in fact, more substantial than those in many "searches" which this Court has held are subject to the warrant requirement. Finally, the additional intrusion involved in the seizure of a person within the home brings the total violation of Fourth Amendment interests in these cases well beyond that which is necessary to trigger application of the warrant requirement.

II. The warrant requirement is essential to the protection of the substantial privacy interests affected by arrest entries and is as important here as in the search context. Because police possess exceptionally wide discretion as to whether, when and where an arrest should be made, a power that has been abused, an arrest warrant issued by a neutral magistrate prior to entry into a home reduces the opportunity for police errors or excesses. The warrant limits and delineates the scope of the permissible intrusion and reduces the frequency with which hindsight may affect the evaluation of the reasonableness of the entry. The warrant also protects against otherwise irreparable deprivations of constitutional rights due to erroneous police judgments.

III. Additionally the warrant requirement, in the

limited circumstance of arrests within the home, imposes no undue burden on law enforcement. It does not limit the power to arrest without a warrant when there are exigent circumstances. On the other hand, where immediate action is not necessary, as is true of a substantial number of arrests, the additional brief delay to obtain a warrant is inconsequential. When measured against the seriousness of the intrusion to privacy within the home, law enforcement interests in being free of the warrant requirement are insubstantial.

IV. Unlike the situation in *United States* v. *Watson*, 423 U.S. 411 (1976) where the common law concerning warrantless public arrests was exceptionally clear, the common law as to arrests within the home is far less certain and many authorities required warrants for entries to arrest. At the time of the framing of the Constitution, common law authorities were in disagreement as to the actual rule and nineteenth century authorities also remained divided. Significantly, once modern courts, both federal and state, considered the issue in the context of Fourth Amendment principles, they concluded overwhelmingly that a warrant is required. Consequently, the history of the common law of arrest provides no guidance in this instance to the proper construction of the Fourth Amendment.

V. If our argument that the Fourth Amendment mandates a warrant for arrests within the home is correct, then only exigent circumstances can excuse police failure to obtain one. The Court of Appeals determined that in neither the *Payton* nor *Riddick* cases were exigent circumstances present.[15] However,

[15]In *Riddick*, the District Attorney has conceded that no exigency existed. See, Motion of the District Attorney of Queens County for Divided Argument in No. 78-5421, p. 3.

in *Payton*, one judge thought that because of the nature of the crime and because the police had been in "continuous pursuit" of Payton there were exigent circumstances. This conclusion is without support either in this Court's decisions or in the record. There was no danger of flight, or imminent destruction of evidence, nor was there "hot pursuit." That a homicide had been committed did not alone give rise to exigent circumstances. And the conduct of the investigating detective, who made not one but two trips to Payton's apartment a day apart and delayed entering the second time until other officers could respond with crowbars, indicated that speed was not essential.

VI. Our final point, applicable only to the *Payton* case and one which need not be addressed if the Court accepts our primary argument on the warrant requirement, is that given the absence of exigent circumstances, the entry into Payton's apartment, because of the force employed, was unconstitutional under the Fourth Amendment.

ARGUMENT

NEW YORK'S FORMER AND CURRENT STATUTES AUTHORIZING WARRANTLESS, NON-CONSENSUAL AND FORCIBLE ENTRIES TO ARREST A PERSON WITHIN HIS HOME IN THE ABSENCE OF EXIGENT CIRCUMSTANCES VIOLATE THE FOURTH AND FOURTEENTH AMENDMENTS.

Introduction

These cases are before the Court to resolve the

unsettled question of whether the Fourth Amendment permits, in the absence of exigent circumsances, warrantless arrests within the home. Although the issue is still open, a plurality of the Court in *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971) stated that:

> It is clear, then, that the notion that the warrantless entry of a man's house in order to arrest him on probable cause is *per se* legitimate is in fundamental conflict with the basic principle of Fourth Amendment law that searches and seizures inside a man's house without warrant are *per se* unreasonable in the absence of some one of a number of well defined "exigent circumstances."

Id. at 477-78.

The decision of the closely divided New York Court of Appeals found no such conflict and held that no warrant was necessary for an entry to arrest. That court thus placed itself at odds with the overwhelming weight of recent judicial authority on the question.[16] Our argument will demonstrate that the court erred in its decision and that the Fourth Amendment, properly construed, mandates reversal because of the high value afforded by it to the privacy interests of the home, the serious intrusion upon those interests by an arrest entry, and the importance of the warrant in safeguarding the interests involved. We shall further demonstrate that there are no legitimate law enforcement purposes served by dispensing with the warrant requirement and that there is nothing in Anglo-American legal history to justify doing so. We conclude by establishing that in both cases at bar there were no exigent circumstances to excuse police failure to obtain a warrant and that in

[16]See nn. 39, 41 *infra*.

the *Payton* case the extreme force actually employed by the police in gaining entry to Payton's apartment constitutes an additional basis for determining the statute authorizing their conduct unconstitutional under the Fourth Amendment.

I. A Warrant Is Required to Arrest a Person in his Home Because Privacy of the Home Is the Paramount Interest Protected by the Fourth Amendment, and Entry of the Home to Arrest Involves a Substantial Invasion of That Interest.

From the adoption of the Constitution to the present, the predominant interest protected by the Fourth Amendment has been the privacy of the home. By its very terms, the Amendment protects the "rights of the people to be secure in their. . . houses. . . against unreasonable searches and seizures," and it has long been recognized that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed. . . ." *United States* v. *United States District Court*, 407 U.S. 297, 313 (1972). The searches and seizures which most deeply concerned the Framers of the Amendment were those involving invasions of the home under authority of writs of assistance. *United States* v. *Chadwick*, 433 U.S. 1, 7-8 (1977). Indeed, John Adams believed that the movement for American independence was sparked by James Otis's speech against the writs and in defense of the home:

> Now one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and while he is quiet, he is as

> well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege.

2 LEGAL PAPERS OF JOHN ADAMS 142-44 (Wroth and Zobel ed. 1965); see, N. Lasson, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 59 (1937). After the revolution, the Framers confirmed the importance of the home by protecting it under two of the amendments in the Bill of Rights. U.S. Const. Amends. III, IV. From the beginning, then, the "freedom of one's house" has stood at the center of our constitutional protections.

In accordance with these precepts, the Court has affirmed that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman* v. *United States*, 365 U.S. 505, 511 (1961). Indeed, since its earliest decisions, the Court has emphasized that the Fourth Amendment applies "to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life." *Boyd* v. *United States*, 116 U.S. 616, 630 (1886). See also, *Agnello* v. *United States*, 269 U.S. 20, 32-33 (1926); *Interstate Commerce Comm.* v. *Brimson*, 154 U.S. 447, 479 (1894). The Court has held that "[t]he right of officers to thrust themselves into a home is. . . a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security. . . " *Johnson* v. *United States*, 333 U.S. 10, 14 (1948). And most recently, it has written that the social and individual interests in "the sanctity of private dwellings [are] ordinarily afforded the most stringent

Fourth Amendment protection" and thus "justify the warrant requirement." *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 561, 565 (1976).

The high value placed upon the home in our Constitutional framework is attributable to its central and multi-faceted significance in the lives of our citizenry. In the first instance, the home is property, and property rights, especially in a dwelling house, are those "enjoying the longest and strongest support." N. Lasson, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE CONSTITUTION, *supra*, at 15, n.9. It is the property interest itself which ensures that a person has a "legitimate expectation of privacy" within the home, an expectation which is grounded in the principle that "[o]ne of the main rights attaching to property is the right to exclude others." *Rakas v. Illinois*, 58 L.Ed.2d 387, 401 n.12 (1978).

But the Fourth Amendment protects far more than the mere property interest in the home:

> if the physical curtilage of the home is protected, it is surely as a result of solicitude to protect the privacies of the life within. Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that is has been found to draw to its protection the principles of more than one explicitly granted Constitutional right.

Poe v. *Ullman*, 367 U.S. 497, 551-52 (1961) (Harlan, J., dissenting). As the Court's decisions have underscored, the home is the place to which persons may, in seclusion, repair to exercise undisturbed their rights of marital privacy, speech and thought. *Griswold* v. *Connecticut*, 381 U.S. 479, 484-485 (1965); see, *Stanley* v. *Georgia* 394 U.S. 557 (1969).

In short, the privacy right which the home encompasses is the very essence of the privacy protected by the Fourth Amendment. For, as Mr. Justice Brandeis stated, the Framers of the Amendment,

> sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Olmstead v. *United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Because the home is the focus of the beliefs, thoughts, emotions and sensations of our people, privacy within it is entitled to and has always recieved the utmost protection under the Fourth Amendment. *United States* v. *Martinez-Fuerte*, 428 U.S. at 561; see also, *Berger* v. *New York*, 388 U.S. 41, 53 (1967); *Camara* v. *Municipal Court*, 387 U.S. 523, 528 (1967).

In light of the paramount Fourth Amendment interests in the privacy of the home, the statement of the majority below that it could "perceive no sufficient reason for distinguishing between an arrest in a public place and an arrest in a residence" (A. 76) is indefensible. The distinction is obvious as this Court observed even when the seizure of property, rather than of people, was in question: "it is one thing to seize without a warrant property resting in an open area. . . , and it is quite another thing to effect a warrantless seizure of property. . . situated on private premises to which access is not otherwise available for the seizing

officer." *G. M. Leasing Corp.* v. *United States*, 429 U.S. 338, 354 (1977); see also, *Coolidge* v. *New Hampshire*, 403 U.S. at 513-514 (White, J., concurring and dissenting).

The majority below concluded, however, that presence in the home did not confer upon a person the same rights against seizure which attach to his property, because an entry of the home to arrest was a "minimal intrusion" into the privacy of the home and because it was a lesser intrusion than an entry to "search" (A. 75, 76). The court's conclusion must fail because its premises are faulty.

The majority erred in assuming that an entry to arrest was a "minimal intrusion on the elements of privacy of the home" (A. 76). First, the entry itself subjects all occupants, not just the suspect, to the presence of intruders. For example, the intrusion in *Riddick* affected not only Riddick himself but also his three-year old son. Moreover, because the manner in which home arrests are made is designed to ensure police safety rather than individual privacy, the entry will often be a disturbing and disruptive event. See, *The Neglected Fourth Amendment Problem in Arrest Entries*, 23 Stan.L.Rev. 995, 997 (1971). Consider, for example, the procedure recommended by one recognized [see, *Miranda* v. *Arizona*, 384 U.S. 436, 449 n.9 (1966)] law enforcement authority:

> the agents should move in quickly, force the subject back into the room and separate inside of the room, avoiding the danger of cross-fire. In the event that the door is not unlocked, a pass key should be quietly inserted and turned without

> standing in front of the door. One agent should kick the door aside sharply to determine if anyone is standing behind it. Again, the agents should move in quickly and spread out against the near wall.

C. O'Hara, FUNDAMENTALS OF CRIMINAL INVESTIGATION 839 (3d ed. 1973).

Second, beyond the entry and presence of police in the home, the privacy of its residents is further violated by police scrutiny of all items in open view. Many of these, such as private papers and documents, mementos and attire are extremely personal and are left in the open only because of the expectation of privacy a person has in his own home. Absent consent, these objects would not ordinarily be subject to the examination of others. See, e.g., *United States* v. *Reed*, 572 F.2d 412, 415-416 (2d Cir. 1978); *Commonwealth* v. *Forde*, 367 Mass. 798, 810, 329 N.E.2d 717, 725 (1975) (Hennessey, J., concurring) ("the crux of the unconstitutional invasion. . . lay in the roving eye of the arresting officer who [entered] the premises."); Comment, *Watson and Ramey: The Balance of Interests in Non-Exigent Felony Arrests*, 38 San Diego L. Rev. 838, 857 n.137 (1976). The extent to which "plain view" alone invades the privacy of the home is thus not minimal.

Furthermore, when police arrest in the home, they do not simply seize and remove the suspect. Rather, upon entry, they often "fan out" or conduct a "protective sweep" sending officers throughout the house. This practice has been approved by many courts

as necessary to their safety.[17] The officers in these two cases followed just such a procedure. In *Payton*, the police, upon gaining entry, immediately spread out through the entire apartment. In *Riddick*, only two of the four officers actually arrested him in the bedroom while the others were apparently elsewhere in the house. Such intrusions can hardly be called "minimal."

Third, entry into a home for the purpose of arrest inevitably entails more than a "plain view" of the premises and its contents, for the arrest itself is invariably accompanied by an incidental search. Although limited in scope, this search may be relatively intensive near the body of the suspect. Depending on where the suspect may be in the premises, the search may extend to its most private areas such as the bedroom or bathroom. When appellant Riddick was arrested, for example, the police searched under his pillow and beneath his bed as well as in the drawers of his dresser. Few areas are more private than these, and the intrusion into them, although justified by the circumstances, cannot be dismissed as insignificant.

Finally, many arrests entail an even greater intrusion than this. Where, for example, upon arrival of the police, the suspect has the misfortune to be in a remote corner of his home, they may conduct a search of any areas of the house large enough to secrete a person,

---

[17] See, e.g., *United States v. Guidry*, 534 F.2d 1220, 1223 (6th Cir. 1976); *United States v. Cepulonis*, 530 F.2d 238, 244 (1st Cir.), *cert. denied*, 426 U.S. 908 (1976); *United States v. Sellars*, 520 F.2d 1281 (4th Cir. 1975); *United States v. Looney*, 481 F.2d 31 (5th Cir.), *cert. denied*, 414 U.S. 1070 (1973); *United States v. Briddle*, 436 F.2d 4 (8th Cir. 1970), *cert. denied*, 401 U.S. 921 (1971); Note, *Watson and Santana: Death Knell for Arrest Warrants?*, 28 Syracuse L. Rev. 787, 803-04 (1977).

until they discover him. See, *Warden* v. *Hayden*, 387 U.S. 294, 298-299 (1967). Where the suspect is not home at all, the entire house, save for small drawers, cupboards, and the like, may be searched. In Payton's case, for example, the officers seeking to arrest him searched under the bed and in closets throughout his apartment. Where an intrusion of this nature occurs, there is no basis for the majority's view that in an entry to arrest "there is no accompanying prying into the area of expected privacy attending [the suspect's] possessions and affairs" (A. 76). The very entry of the home is itself a "prying" into the most private area of all, and the ensuing search for the suspect may invade the privacy of all "possessions and affairs" implicated in it.

As a theoretical matter, the majority's distinction between a search and an arrest is unsound because it disregards the nature of the violation of a householder's privacy expectations caused by an arrest entry. The Fourth Amendment's reach is not contingent upon whether some intrusion traditionally called a "search" has occurred but upon whether there has been an intrusion, of whatever kind, into an area in which there is a legitimate expectation of privacy. It is not only the "rummaging of drawers" against which the Amendment speaks, but against "the invasion of [a person's] right to personal security, personal liberty and private property." *Boyd* v. *United States*, 116 U.S. at 630.[18]

[18]Thus, while the use of force or violence in entry may create "circumstances of aggravation," they are not the crux of the Fourth Amendment violation. *Boyd v. United States*, 116 U.S. at 630. Even a peaceful entry, if not consented to, invades the home's privacy and is subject to the warrant requirement. *United States v. Reed*, 572 F.2d 412, 423 n.9 (2d Cir. 1978); *Morrison v. United States*, 262 F.2d 449 (D.C. Cir. 1958).

The label "search" is thus not entitled to the talismanic significance given it by the Court of Appeals. Just as the common law concept of "trespass" failed to encompass fully the privacy expectations within the home [compare, *Olmstead* v. *United States*, 277 U.S. 438, with *Katz* v. *United States*, 389 U.S. 347 (1967)], the Court of Appeals' search/arrest dichotomy denigrates unjustifiably the true interests at stake.

The Court of Appeals' erroneous analysis is underscored, in concrete terms, by the fact that the privacy interests affected when arrests are made within the home are considerably greater than those which this Court has often protected by imposition of the warrant requirement when a search has been involved. For example, the Court has held that expectations of privacy in a mere footlocker [*United States* v. *Chadwick*, 433 U.S. 1 (1977)], in packages sent through the mail [*Ex parte Jackson*, 96 U.S. 727 (1876)], in the rubble of a burned-out business establishment [*Michigan* v. *Tyler*, 436 U.S. 499 (1978)], and in business premises open to numerous employees [*Marshall* v. *Barlow's Inc.*, 436 U.S. 307 (1978)] command the safeguards of the Warrant Clause.[19] While the privacy interest in each of these instances is significant, it is overshadowed by that which people enjoy in the privacy of their own homes. It follows, therefore, that if these lesser interests are protected through interposition of a neutral magistrate, the greater should be as

[19]In *Camara v. Municipal Court*, 387 U.S. 523 (1967), where the home was involved but entry was merely to view its contents and structure to determine compliance with building code requirements, a warrant was also required.

well.[20]

The Fourth Amendment interest in the "security of. . . persons" adds further justification for the application of the warrant requirement in these cases. In addition to the intrusion on the home, these cases also involve the "serious personal intrusion" of arrest, an intrusion which alone may be greater than the invasion of privacy involved in a search. *United States* v. *Watson*, 423 U.S. at 428 (Powell, J., concurring). *Chimel* v. *California*, 395 U.S. 752, 776 (1969) (White, J., dissenting). *United States* v. *Watson, supra,* did not hold that the invasion involved in an arrest was insubstantial, but found that warrantless public arrests had been universally accepted for so long that they

[20]The majority also erred in concluding that in terms of its intrusiveness an arrest in the home was indistinguishable from one made in public and that, indeed it might even be less so because there was not the "added exposure" of an arrest in public (A. 76). The American Law Institute employed the same reasoning in recommending that no warrant should be required. ALI, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, Commentary to Section 120.6 at 307 (1975). There is no valid basis for these assumptions. Whether the offensiveness of a street arrest is greater is largely a matter of individual circumstance and subjective reaction. Many street arrests occur out of the view of others or in situations where little or no attention is paid. On the other hand, arrests within the home frequently cause great humiliation because of the presence of family, friends or neighbors. Indeed, Riddick's arrest in the presence of his three-year-old son may have caused him great embarrassment and terrified the boy as well. Had Riddick been arrested in public he would have been spared the embarrassment of being placed under arrest while naked in bed. More fundamentally, however, the embarrassment quotient in public *vis-a-vis* home arrests is irrelevant to the issue of whether a warrant is required for the latter. Wherever the arrest occurs, there is present the intrusion caused by loss of liberty. But when the arrest is made in the home, there is the additional intrusion on privacy and it is that intrusion which triggers the warrant requirement.

must be deemed reasonable. 423 U.S. at 423-24. In that case, the logic by which warrants would be required for all invasions of such magnitude had to defer to history. *Id.* at 429 (Powell, J., concurring). As we show below, however, there is no historical basis for exempting the entry of the home to arrest from the warrant requirement. See *infra* pp. 40-55. In the absence of any such historical basis, the gross intrusion of a seizure of the person adds further reason for requiring warrants for arrests in the home. Indeed, it is "incongruous to pay homage to the considerable body of law that has developed to protect an individual's belongings from unreasonable search and seizure in his home, and at the same time assert that identical considerations do not operate to protect the individual himself in the same setting." *People* v. *Ramey*, 16 Cal. 3d 263, 275, 545 P.2d 1333, 1340. *cert. denied*, 429 U.S. 929 (1976).

II. The Warrant Requirement Is Essential to the Protection of the Privacy Interests at Stake When Arrests Are Made Within the Home.

At the "very heart of the Fourth Amendment" is the requirement that where practical a search and seizure should be justified by a magistrate's judgment that there is sufficient cause for the intrusion. *United States* v. *United States District Court*, 407 U.S. at 316. In the context of criminal investigation, it is this requirement which protects the individual's legitimate expectation of privacy against the "overzealous police officer." *South Dakota* v. *Opperman*, 428 U.S. at 383 (Powell, J., concurring). As a result, the Court has, in the case of

searches, consistently held that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Mincey* v. *Arizona*, 57 L.Ed.2d 290, 298-299 (1978); *Camara* v. *Municipal Court*, 387 U.S. at 528-29. Where, as in the cases at bar, even greater privacy interests are invaded than in many "searches," and where the warrant provides important protection against unfounded or excessive invasions, the warrant requirement should also apply.

The arrest warrant fulfills the same high function as the search warrant of placing in the hands of a "neutral and detached magistrate" the difficult determination of probable cause. *Gerstein* v. *Pugh*, 420 U.S. 103, 113 & n.12 (1975). Indeed, it was in a case of unlawful arrest that Lord Mansfield wrote "[i]t is not fit that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer." *Leach* v. *Three of the King's Messengers*, 19 How. St. Tr. 1001, 1027 (1765); see, *United States* v. *United States District Court*, 407 U.S. at 316. In arrest cases, of course, the officer has enormous discretion as to whether, whom, when and where to arrest,[21] a power

[21] Where the officer's discretion is limited, even in search cases, no warrant may be required. *United States v. Martinez-Fuerte*, 428 U.S. at 566; *South Dakota v. Opperman*, 428 U.S. at 383-84 (Powell, J., concurring). But in determining probable cause to arrest, the officer exercises wide-ranging discretion. He must take into account many facts in highly variable situations and reach a decision which even courts often find difficult. See, e.g., *Beck v. Ohio*, 379 U.S. 89 (1964); *Draper v. United States*, 358 U.S. 307 (1959). When such a decision is to be made, it is far better that it be made by someone whose judgment is not colored by the "often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. at 14.

subject to "not infrequent abuse." *Wong Sun* v. *United States*, 371 U.S. 471, 479 (1962); see, e.g., *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971); *Lankford* v. *Gelston*, 364 F.2d 197 (4th Cir. 1966). Where there exists such discretion and the concomitant possibility of error or abuse, it is the magistrate, and not the potentially "overzealous police officer" who should judge whether grounds exist for the entry of a home. See, *South Dakota* v. *Opperman*, 428 U.S. at 383 (Powell, J., concurring); *Johnson* v. *United States*, 333 U.S. at 14. Even in arrest cases, therefore, the warrant provides the "[m]aximum protection of individual rights" (*Gerstein* v. *Pugh*, 420 U.S. at 113), and where a home is to be entered solely upon a discretionary judgment that there is probable cause to arrest one of its occupants, that judgment should be made by a magistrate.

The warrant adds further protection to the citizen's rights by specifying the purpose of the intrusion and its lawful scope. *United States* v. *Chadwick*, 433 U.S. at 9. Officers who have obtained only an arrest warrant will recognize accordingly that they have autority solely to make the arrest and the strictly limited search incident to it. Too often, however, when the police enter a home without a warrant they fail to distinguish between their authority to search and to arrest, and engage in a general search where only a limited one is authorized. See, e.g., *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. at 389. In appellant Payton's case, for example, the police, despite their knowledge, gained shortly after entry, that he was not at home, conducted an extensive search of the entire apartment, opening closets, dresser drawers and cupboards. As Judge Cooke observed in dissent, "[h]ad the police in fact obtained a warrant, limiting the scope of their activities

after entry, their patently illegal actions in conducting a full-blown search of the premises might have been avoided" (A. 92-93).

Another purpose of the warrant requirement applicable to arrests in homes is that of preventing hindsight from coloring later evaluations of the entry's reasonableness. *United States* v. *Martinez-Fuerte*, 428 U.S. at 565; *South Dakota* v. *Opperman*, 428 U.S. at 383 (Powell, J., concurring). That which fortuitously turns up on entry may well make police actions look, in retrospect, more reasonable than they were when taken. Moreover, there is often the question, when the police enter a home, of whether they intended to arrest or to search. When an illegal warrantless search is attempted, justification may later be sought for it on the grounds that a warrantless entry to arrest would have been permissible. See, *Jones* v. *United States*, 357 U.S. 493, 500 (1957). Where warrants are required for entries, however, the officer's authority will be clear and will not be subject to amendment by hindsight.[22]

[22] Police have also been known frequently to engage in the practice of "timed arrests," an arrest which has been scheduled for a time at which they hope to discover not only the suspect but evidence of the crime. Thus it has been observed that:

> In the case of an arrest in the suspect's home, a timed arrest could take a number of possible forms. Police might, for example, refrain from arresting a suspect until the suspect has entered his home in the hope that, upon entry into the home to arrest the suspect, they will discover evidence in plain view or during a search incident to arrest. Police might also refrain from arresting a suspect who is in his home until they believe that evidence for which there is no probable cause to search is in fact present in the home. Timed arrests amount to an avoidance of the search warrant requirement, and base the high level of intrusiveness inherent in a police invasion of the home on the slender reed of a police officer's determination that probable cause to arrest exists. Note, *Warrantless Entry to Arrest: A Practical Solution to a Fourth Amendment Problem*, 1978 U. Ill. Law Forum 655, 658 n.21.

Finally, the warrant is crucial because it offers protection against otherwise irreparable violations of rights by the police. An individual who is wrongfully arrested in his home must receive thereafter a judicial determination of the grounds for holding him before his detention may be prolonged. *Gerstein* v. *Pugh*, 420 U.S. 103. Although that determination may result in his release, it will come too late to repair the injury done him. See, *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. at 389. And his subsequent release does nothing to repair the injury to innocent family or friends in his home whose privacy was also invaded. Only the warrant requirement can adequately protect against such injury, for only it prevents such invasions before they occur and thus protects the innocent as well as the guilty from violations of their rights. *Chimel* v. *California*, 395 U.S. at 766 n.12. Because of the supreme protection provided by the warrant for the security of houses and persons, it is required by the Fourth Amendment prior to any invasion of the home to arrest, absent exigent circumstances.

III. The Warrant Requirement for Arrests Within the Home Imposes No Undue Burden on Legitimate Law Enforcement Concerns.

The fundamental importance of the privacy interest within the home is not outweighed by law enforcement interests in dispensing with a warrant for home arrests. In the limited context of arrests within the home, the warrant requirement imposes no undue burden upon the police. First, in no way does it prohibit them from making arrests in a residence if they deem it advisable; they may always do so under a warrant or without one

when immediate action is necessary. Second, where no exigent circumstances exist, such as the possibility of escape, the destruction of evidence, or a life-endangering emergency, no legitimate law enforcement interest is served by dispensing with a warrant. Whatever "slight delay necessary to prepare papers and present the evidence to a magistrate" may occur is not by itself "enough to by-pass the constitutional requirement." *Johnson* v. *United States*, 333 U.S. at 15.

Indeed, in large numbers of routine cases of arrest in the home, the government has no interest in proceeding to make the arrest immediately, instead of expending the short time necessary to obtain a warrant.[23] For example, once a substantial period of time has elapsed after the crime the need for immediate entry of the home to arrest has evaporated. In such a case, by the time the police seek a suspect at home, they will have determined both his identity and the location of his residence. The danger present in "hot pursuit" situations that the suspect may never even be identified does not exist. Moreover, the very act of the police in seeking him out at his home demonstrates their belief

[23]In fact, the police make a substantial number of arrests long after a crime has been committed. LaFave, *Warrantless Searches and the Supreme Court: Further Ventures Into the Quagmire*, 8 Crim. L. Bull. 9, 22-23 (1972). Conversely, a significant number of arrests are made within a very short time after a crime has been committed. President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Science and Technology 96 (1967). These arrests often involve exigent circumstances and thus would be excepted from the warrant requirement. See, Note, *Warrantless Entry to Arrest: A Practical Solution to the Fourth Amendment Problem*, *supra*, n.22 at 666 n.71. In the latter cases the arrest is frequently made in public, at the scene of the crime, and the warrant requirement does not even apply.

that he has neither fled the jurisdiction nor gone into hiding. Thus, where the crime was committed some time before and the suspect is still in his home, the danger of escape or other harm dissipates and there is nothing to be said for dispensing with a warrant.

Furthermore, that a routine arrest is to be made in the home in itself usually means that the police have ample opportunity to obtain a warrant. Except in hot pursuit cases, or in other cases of sudden exigency, the decision to arrest in the home is deliberate and is made some time in advance of the actual arrest. The police must, at the least, proceed from the station-house to the suspect's house in order to make it; in the routine case, there is no reason why they should not also take the additional time to obtain authorization for their actions. Also, the procedure recommended for arrests in a building, and used in both cases at bar, is that they be made by a number of police officers. C. O'Hara, Fundamentals of Criminal Investigation, *supra*, at 839. During the time required to gather reinforcements and proceed to the site, one of the officers could easily obtain the warrant.

In both cases herein, obtaining a warrant would have been no hindrance whatever to the police. Both crimes had been completed days or months before and still the police believed appellants were in their homes. Additionally, the police themselves failed to attempt an arrest at the first opportunity. This deliberate delay on their part strongly suggests that the slight additional delay to obtain a warrant would not have been at all burdensome. In such cases as these, which are by no means atypical, the claim that a warrant requirement is

an onerous burden upon the police is unfounded.[24]

In *United States* v. *Watson*, however, Mr. Justice Powell suggested that imposition of a warrant requirement for arrests might pose a serious dilemma for the police. 423 U.S. at 431-432. If they sought a warrant immediately upon obtaining probable cause, that warrant might go stale before execution. If they delayed obtaining a warrant, and a sudden emergency required an immediate arrest, a court might hold their failure to get the warrant inexcusable because they had the opportunity to do so. The burden which results from this dilemma is negligible. First, as Mr. Justice Powell himself noted, arrest warrants will rarely go stale. 423 U.S. at 432 n.5. This is so because probable cause to arrest is predicated on suspicion of an ineradicable crime rather than on the momentary presence of evidence or contraband at a particular location. Accordingly, an arrest warrant tends to remain valid indefinitely. Thus, in Riddick's case,

[24]Such routine cases of delayed arrest in the home are precisely the types of cases in which the warrant furnishes the greatest protection against unreasonable entries. In such cases, the police often believe they have cause to arrest based on information obtained some time after commission of the crime; the belatedly obtained information may well be suspect, and examination by the neutral eye of the magistrate is most necessary to protect individual rights against overzealous action. Thus, even the United States Government has suggested that:

> because entries to make arrests for crimes long completed are more likely to be mistaken, and are more open to abuse, than are entries to arrest individuals for freshly committed or ongoing crimes, the Court might hold that warrants ordinarily should be obtained to make arrests for *crimes completed more than a few hours prior to the arrest.*

Brief for the United States in *United States v. Santana*, 427 U.S. 38 (1976) at 47 (emphasis ours).

where the police had probable cause for nine months, there would not have been a staleness problem. See, e.g., *Wilson* v. *United States*, 325 F.2d 224 (D.C. Cir. 1963) (five month delay in execution of arrest warrant sustained). Moreover, if police delay making an arrest or search and the sudden need to do so arises, the exigency will excuse the failure to get the warrant. See, *United States* v. *Lisznyai*, 470 F.2d 707, 710 (2d Cir. 1972) *cert. denied*, 410 U.S. 987 (1973). Therefore, the burden, if any, posed by this dilemma is, in the context of the privacy interests involved here, constitutionally insignificant.[25]

Lastly, the view that obtaining arrest warrants for arrests in private dwellings is an intolerable burden is belied by contrary views of authorities on law enforcement. The Federal Bureau of Investigation, for one, makes a practice of obtaining warrants for all arrests if time permits. Brief for the United States in *United States v. Watson*, 423 U.S. 411 (1976) at 26 n.15. In

[25]In their brief to the Court of Appeals in the *Payton* case, the prosecution argued that a mandatory warrant requirement would also be burdensome because "[o]nce probable cause develops, the officer's judgment may be that further steps in the investigation should immediately be taken concerning the crime, the location of the suspect, or how to effect his arrest," and that "[g]iven the practical limitations on law enforcement resources assigned to the case, such steps may not be possible if the officer must take time out from the investigation to obtain an arrest warrant." (Brief, pp. 91-92). This argument sets up a false predicament, however, for the hypothetical officer need not choose between obtaining the warrant and investigating further; he may do both by waiting to get the warrant until after his investigation is complete. In choosing to continue his investigation, rather than arresting immediately, the officer apparently perceives no risk of escape, and the slight additional delay in getting the warrant imposes no burden.

addition, a leading text on criminal investigation counsels that "[i]f it is necessary to effect an arrest in a hotel or apartment house, a warrant should be obtained if time permits." C. O'Hara, FUNDAMENTALS OF CRIMINAL INVESTIGATION, *supra*, at 839.

As these authorities apparently agree, there is no undue hindrance to law enforcement involved in obtaining warrants for home arrests. Whatever extra efforts the police must make to get a warrant is an insignificant burden in comparison with the importance of the privacy the warrant protects. Thus, the warrant requirement is fully consistent with "the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law." *Mincey v. Arizona*, 57 L.Ed.2d at 301.

IV. The History of the Common Law of Arrest Requires No Different Result.

As we have shown, traditional Fourth Amendment analysis, which balances the right to privacy against the needs of law enforcement, compels the conclusion that warrants are required for the entry of a home to arrest. In *United States v. Watson*, however, the Court considered a factor outside the traditional analysis—the history of the common law of arrest—in determining that warrants were not required for arrests in public. The nature of the common law with respect to warrantless arrests within private dwellings is so markedly different from that which governed public arrests that it cannot serve as a meaningful guide to

resolution of the issue in this case.

The common law concerning warrantless public arrests rehearsed in *Watson* was remarkable for its clarity, its abundance and its continuity. The rule that felony arrests in public could be made without warrant had been formulated in unequivocal fashion from the seventeenth century. Since that time, numerous cases in both England and America had reiterated the rule, and there had been not a single case, until *Watson* itself, in which a court had required a warrant for a public felony arrest. Perhaps most significantly, the rule was well established at the adoption of the Fourth Amendment and nothing suggested that the Framers intended to abandon it. *United States v. Watson*, 423 U.S. at 429-430 (Powell, J., concurring). Given the universal acceptance of the rule, when this nation was founded and ever since, the conclusion was compelling to a majority of the Court that warrantless public arrests were reasonable and that the Framers of the Fourth Amendment had implicitly approved them.

As we demonstrate below, however, the state of the common law with respect to arrests in the home was altogether different and does not permit the same conclusions to be drawn. As the Court has previously recognized, there was never on this question the universal agreement which existed concerning the propriety of warrantless arrests in public. *Miller v. United States*, 357 U.S. 301, 307-308 (1958). Indeed, despite considerable disagreement, a strong current of authority throughout the eighteenth and nineteenth centuries required warrants for non-exigent arrests in a suspect's home. The recent authority considering the question in light of Fourth Amendment principles has

overwhelmingly required such warrants. Under these circumstances, legal history provides no guide to the proper construction of the Fourth Amendment.

A. The Common Law of Entries to Arrest Was Wholly Unsettled at the Framing of the Constitution.

In this case, unlike *Watson*, reliance on the common law rule would be especially misplaced, for the rule regarding entries to arrest was in substantial dispute at the time of the adoption of the Fourth Amendment. In *Watson*, the rule permitting warrantless arrests in public was well accepted by the end of the eighteenth century and had been adopted implicitly by the Second Congress. This circumstance permitted the inference that the "constitutional provision was intended to restrict entirely different practices." 423 U.S. at 430 (Powell, J., concurring). Here, however, the uncertain status of the law concerning entries of a home to arrest allows no conclusion to be drawn concerning the intent of the Framers regarding them.

Insofar as the term "common law" denotes a continuous series of judge-made rulings on an issue, there was no common law of arrest entries. Prior to the adoption of the Constitution, the only English cases even remotely addressing the subject dealt with when doors might be "broken" in the execution of civil process, a question separate from that of entry in a

criminal case.[26] See, Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California*, 112 U. Pa. L. Rev. 499, 501 (1964) ("The extent to which privilege of the house extended to criminal rather than civil cases seems never to have been considered squarely."). The *dicta* in those cases do not clearly establish whether or not a warrant was necessary to break doors to make a felony arrest.

At the adoption of the Fourth Amendment, the most recent case on the subject was *Semayne's Case*, 77 Eng. Rep. 194 (K.B. 1603), and it was then almost two

---

[26]The common law was concerned with when a "breaking" might be committed to effect an arrest, but the word "breaking" was a term of art which did not denote the actual physical destruction of property or forcible entry. At its broadest, the term included virtually any trespassory entry. See, 2 E. East, PLEAS OF THE CROWN 485 (1803) ("every entry by a trespasser [is] a breaking in law"); M. Dalton, THE COUNTRY JUSTICE 299 (1697) (where persons come armed "to an House that is open . . . and shall there enter peaceably without any disturbance; yet this is a Forcible Entry, for it shall be intended, that they would have used force, if they had been resisted"). Even in the somewhat narrower use of the term in the law of burglary, no force was required to constitute a breaking. For example, the entry made by opening fully a partially opened door was a breaking. R. Perkins, CRIMINAL LAW 193 (2d Ed. 1969). Indeed, a constructive breaking could occur where an occupant of the house opened a door to intruders and they entered peaceably. See, e.g., *Commonwealth v. Lowrey*, 158 Mass. 18, 32 N.E. 940 (1893) (Holmes, J.) (if an innocent hand opens the door to an intruder it is a breaking); *State v. Mordecai*, 68 N.C. 207 (1873); (peaceable entry); *Johnston v. Commonwealth*, 85 Pa. 54, 64 (1877); *Parke v. Evans*, Hob. 62,80 Eng. Rep. 211 (K.B. 1615). Thus, in by a young boy, their abrupt entry without seeking or obtaining consent constituted a common law "breaking."

centuries old.[27] In that case, the court had held that the defendant was entitled to refuse entry to his home to officers executing a writ of attachment upon property, since the officers had not made known that they came with civil process and requested entry. 77 Eng. Rep. at 199. In the course of its discussion, the court considered, in *dicta*, the question of when doors might be broken "either to arrest . . . or to do *other* execution of the K[ing's] process." 77 Eng. Rep. at 195 (emphasis ours). The court concluded that on suspicion of felony,[28] an officer

[27]The only other case on the subject was decided three centuries before the American revolution and is found in the 13th Yearbook of Edward IV (1461-1483), at folio 9. It too contains only *dicta* concerning arrests or suspicion of felony, for it concerned only when doors might be broken to serve civil process. *Miller v. United States*, 357 U.S. 301, 307 (1958). The court's discussion says that where there is suspicion of felony, doors may be broken to arrest because the writ is a *non omittas*; the obvious presumption is that there will be a writ, or warrant, of some kind. *Accarino v. United States*, 179 F.2d 456, 460 (D.C. Cir. 1949).

[28]We deal here only with the common law rules applicable to arrests made "on suspicion of felony," the ancient equivalent of our probable cause. The common law distinguished between suspicion of felony and actual "knowledge" of felony, the difference consisting of whether the constable "saw the felony committed, or hath it only by complaint and information." 2 M. Hale, THE HISTORY OF THE PLEAS OF THE CROWN 91 (1736). Everyone agreed that where the constable actually had witnessed the felony, that is "[w]here one known to have committed a Treason or Felony . . . is pursued," doors could be broken without warrant. 2 W. Hawkins, PLEAS OF THE CROWN 86 (1716). All the old language to the effect that doors could be broken open on "knowledge" or "for felony," simply states the well accepted doctrine that warrantless entries may be made in "hot pursuit." *Warden v. Hayden*, 387 U.S. 347 (1967). The only question of interest here is what the common law authorities thought of arrests which were not made in hot pursuit, that is, of arrests on "suspicion," rather than knowledge, of felony. On this question there was no agreement.

> may break the house to apprehend the felon, and that for two reasons:
>
> 1. For the commonwealth, for it is for the commonwealth to apprehend felons.
>
> 2. In every felony the King has interest, and where the King has interest the writ is *non omittas propter aliquam libertatem* [to be executed notwithstanding any liberty]; and so the liberty or privilege of a house doth not hold against the King.

77 Eng. Rep. at 197. Aside from its lack of relevance to the Fourth Amendment,[29] the most striking facet of the case is that it does not say whether or not a warrant was required for the breaking. Indeed, both the references to "other . . . process" and to "the writ" in connection with the breaking to arrest imply that some warrant or other judicial authorization was contemplated.

The complete absence of any case law following *Semayne's Case* led to understandable confusion among the commentators about what the actual rule was. One strong current of authority contended that judicial authorization was necessary for the entry of a home

[29]The reasoning of *Semayne's Case* is appropriate only to the determination of the relationship between the King and a feudal lord and not between the modern state and the citizen which is governed by the Fourth Amendment. The writ referred to in the text, *non omittas propter aliquam libertatem*, was a writ employed by the medieval Kings to restrain the independence of those lords who held private rights of doing justice in their own domains, called "liberties." When the lord's steward refused to execute the King's writ within the liberty, the King's court would issue the *non omittas* writ directing the sheriff to execute it himself, notwithstanding the existence of the liberty. H. Cam, LIBERTIES AND COMMUNITIES IN MEDIEVAL ENGLAND 191-92 (1944). Thus, the King established himself as the primary source of justice in a judicial system fragmented by feudal rights. In this light, *Semayne's Case* appears correctly as an expression of the growth of the power of the modern state; the Fourth Amendment stands, however, as a recognition that that very power had grown too great and must be limited.

"on suspicion of felony," absent the ancient equivalent of exigent circumstances. Lord Coke was an early proponent of this view. In his opinion, entry of a home to arrest could be made only by a warrant (*capias*) issued after an indictment, or on hue and cry, that is in "hot pursuit," without a warrant. E. Coke, 4 INST. *177. Otherwise, a man's home was his castle and could not be entered even upon a warrant issued by a justice of the peace. *Id.* Thus, so sacred was the home for Coke that in the absence of exigency he required a finding of probable cause to be made by a grand jury, rather than a mere magistrate.

A number of later authorities continued to follow Coke's view or some modified version of it. Hawkins, for example, after noting that doors could be broken where one "known" to have committed a felony was "pursued," added, "[b]ut where one lies under a probable suspicion only, and is not indicted, it seems the better Opinion at this Day, That no one can justify the breaking open Doors in Order to apprehend him." 2 W. Hawkins, PLEAS OF THE CROWN 86-87 (1716). Similarly, at the outbreak of the American revolution Justice Foster, in the second edition of his treatise, flatly stated, "[b]ut bare suspicion touching the guilt of the party will not warrant a proceeding to this extremity [breaking doors], though a felony hath been actually committed; unless the officer cometh armed with a warrant from a magistrate grounded on such suspicion." M. Foster, CROWN LAW 321 (2d ed. 1776). Finally East, writing at the end of the century, held the same view:

> But though a felony have been actually committed, yet a bare suspicion of guilt against the party will not warrant [breaking doors], unless the officer be armed with a magistrate's warrant grounded on such suspicion. It will at least be at the peril of proving that the party so taken on suspicion was guilty.[30]

1 E. East, PLEAS OF THE CROWN 322 (1803). East emphasized the necessity for a warrant in discussing the principle that the home could be entered, without a warrant, to rearrest a suspect. After explaining the principle, he added: "If it be not, however, *upon fresh pursuit*, it seems that the officer should have a warrant from a magistrate." *Id.* at 324 (emphasis ours). Thus, at the end of the eighteenth century, substantial authority held that a warrant was necessary to "break doors" to arrest, absent some exigency.[31]

There was, of course, contrary authority. Hale, for example, supposed a general authority of the King's officers to enter homes without warrants to arrest on suspicion of felony. 1 M. Hale, THE HISTORY OF THE PLEAS OF THE CROWN 588 (1736). Even Hale, however, recognized that the better practice was to obtain the warrant when ever possible: "Yet to avoid question in these cases, it is best to obtain the warrant of a justice, if

---

[30]The significance of this last sentence will be dealt with at pages 54, 55, *infra*.

[31]The drafters of the ALI Model Code believed this to be the prevailing common law view: "[a]t common law officers were authorized to break into a house to effect an arrest *only* if the arrest was under a warrant, or according to some but not all authorities without a warrant on suspicion of felony." ALI, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, Commentary to §120.6, at 308 (1975) (emphasis ours).

the time and necessity will permit." *Id.* at 589.[32] Moreover, Hale permitted such extreme measures to be taken only if a felony had *actually* been committed: "But there must be a felony in fact done, and the constable must be ascertained of that, and aver it in his plea, and it is issuable [that is, triable as an issue in an action for false imprisonment or trespass]." 2 M. Hale, *supra*, at 92; see, also, 1 M. Hale, *supra*, at 588. Hale's authorization of warrantless breakings to arrest is thus heavily qualified by his admonition that warrants should be gotten whenever possible and by his imposition of civil liability on officers who made good faith arrests in the mistaken belief that a felony had been committed.

The only remaining authority clearly permitting warrantless breakings is the influential Blackstone:

> And, in case of felony actually committed, or a dangerous wounding whereby felony is like to ensue, [the constable] may upon probable suspicion arrest the felon; and for that purpose is authorized (as upon a justice's warrant) to break open doors, and even to kill the felon if he cannot otherwise be taken. . . .

4 W. Blackstone, COMMENTARIES *292. Blackstone's statement of the proposition is remarkable only for the absence of his usual thoroughness in treating the varying opinion on the subject; his only citation is to Hale. In adopting Hale's view without comment, however, Blackstone also took the position that warrantless entries to arrest were permissible only "in

[32]Apparently because of this, one later commentator assumed that Hale permitted entries only upon a warrant. See, R. Burn, THE JUSTICE OF THE PEACE AND PARISH OFFICER 107 (16th ed. 1788).

case of felony actually committed." *Id.* Thus, according to both Blackstone and Hale, an officer could insulate himself from liability for a mistaken arrest only by obtaining a warrant.[33]

By the end of the eighteenth century, therefore, the common law was in substantial disarray over the question of breaking doors to arrest on suspicion. There were simply no cases on the subject. Among the commentators there was, as we have shown, substantial disagreement. See also, Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California, supra*, 112 U. Pa. L. Rev. at 502 n.30. The most that can be said is that many authorities did require warrants, and that those who did not permitted warrantless breakings only in limited circumstances.

Under these circumstances, it cannot be inferred that the Framers of the Fourth Amendment intended either to approve or disapprove warrantless entries of the home to arrest. Compare *United States v. Watson*, 423 U.S. at 429-430 (Powell, J., concurring); see, Note, *Forcible Entry to Effect a Warrantless Arrest—The Eroding Protection of the Castle*, 82 Dick. L. Rev. 167, 182 (1977). The Framers never specifically addressed the question, and there is no way to know whether they would have adopted Hale's view over Foster's, had they given it thought. All that we really know is that the Framers "intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth," (*United States v.*

[33]Dalton is sometimes cited as being in accord with this view, but in fact he does not say whether a warrant is required for an arrest on suspicion of felony. M. Dalton, THE COUNTRY JUSTICE 307 (1697).

Chadwick, 433 U.S. at 9), and that the value they most wished to safeguard was the privacy of the home. *Id.* at 8; see *United States v. United States District Court*, 407 U.S. at 313.

B. The Common Law Authorities in the Nineteenth Century Remained Divided on the Warrant Requirement.

Examination of the American common law authorities of the nineteenth century demonstrates that the rules concerning breakings to arrest did not become settled during that period. Many commentators continued to be of the opinion that warrants were required before a house could be broken on suspicion of felony. Indeed, Russell, after stating that suspicion would not authorize a breaking "unless the officer comes armed with a warrant from a magistrate" goes on to say that "a different doctrine appears to have *formerly* prevailed upon this point; by which it was held, that if there were a charge of felony laid before the constable and reasonable ground of suspicion, such constable might break open CRIMES AND MISDEMEANORS 628-29 (5th Am. ed. 1845) (emphasis ours). In Russell's opinion, the earlier views of Hale and Blackstone had been superseded.

Likewise, numerous other authorities believed that warrants were necessary to break a house on suspicion. Some stated the rule as an inescapable requirement. See, F. Heard, A TREATISE ADAPTED TO THE LAW AND PRACTICE OF THE SUPERIOR COURTS . . . IN CRIMINAL CASES 148 (1879). Others, adopting East's formulation, stated that the warrant was generally required but that an officer might possibly escape civil liability for omitting it by proving that the arrestee was actually

guilty of a felony:

> For where a person lies under probable suspicion only, and is not indicted, it is said to be the better opinion, that the breaking open doors without a warrant, in order to apprehend him cannot be justified: or must at least be considered as done at the peril of proving that the party, so apprehended on suspicion, is guilty.

1 W. Russell, *supra* at 629; *accord*, 2 O. Barbour, A TREATISE ON THE CRIMINAL LAW AND CRIMINAL COURTS OF THE STATE OF NEW YORK 547 (3d ed. 1883) (adding, "it will be prudent to obtain the warrant of the magistrate. . . under which the officer will be justified in thus proceeding"); 1 J. Colby, A PRACTICAL TREATISE ON THE CRIMINAL LAW AND PRACTICE OF THE STATE OF NEW YORK 73 (1868); A. Tiffany, A TREATISE ON THE CRIMINAL LAW OF THE STATE OF MICHIGAN 97 (5th ed. 1900). The cautious "at least" of the commentators correctly suggests that it was in doubt whether an officer could justify his actions by showing the suspect's guilt or whether he was absolutely liable whenever he made a warrantless breaking on suspicion.

Again, other authorities would have imposed no warrant requirement, although they conceded the actual state of the law was in doubt. Chitty catalogued the varying opinions before deciding that a warrant was not necessary for an officer acting in good faith. 1 J. Chitty, CRIMINAL LAW 53 (3d Am. ed. 1836).[34]

[34]Even Chitty is cautious about eliminating the warrant, however, stating that "the breaking an outer door is, in general, so violent, obnoxious and dangerous a proceeding, that it should be adopted only in extreme cases, where an immediate arrest is requisite." 1 J. Chitty, CRIMINAL LAW 53 (3d Am. ed. 1836).

Bishop also notes the conflict, stating as a reason for it that "the adjudications are few, and much of the doctrine on this subject in our books is drawn from the old *dicta*." 1 J. Bishop, CRIMINAL PROCEDURE 109 n.6 (3d ed. 1880).

Although Bishop argues that warrants should not be necessary, he is among the first to give reasons for his view, and those reasons demonstrate why the views of common law authorities are not an adequate guide to construction of the Fourth Amendment. The first ground given for dispensing with the warrant for arrests in the home is that such arrests are "in behalf of the State." *Id.* This argument, obviously a holdover from the notion that no liberty was a sanctuary against the King's writ, conflicts with the very notion that the Fourth Amendment is a restraint on the State's ability to intrude on a citizen's privacy, even when the State acts in its own "behalf." Were Bishop's reasoning to be accepted, then any search for evidence of crime could be conducted without a warrant too, for such proceedings are also in the State's interest.

Bishop's second reason for omitting the warrant is even stronger grounds for rejecting nineteenth century views in the matter. According to him, the warrant is not necessary because "the question of warrant or no warrant pertain[s] to form, not substance." *Id.* It would be hard to imagine any view more in conflict with modern Fourth Amendment law under which the warrant is the primary protection of Fourth Amendment rights. See, *Coolidge v. New Hampshire*, 403 U.S. at 481.

Finally, Bishop expressed concern that the requirement of a warrant might lead to escape. 1 J. Bishop,

supra at 196 n.6. But as we have noted, where there is genuine danger of escape, there are exigent circumstances and no warrant is required under the Fourth Amendment. *Johnson v. United States*, 333 U.S. at 15.

Whether or not Bishop's reasoning, so foreign to the twentieth century, was even accepted in the nineteenth is impossible to determine, for there is an almost complete absence of cases on the subject.[35] A few cases quote Hale or Blackstone approving warrantless entries but always in cases where the issue is not in question. See, *Shanley v. Wells*, 71 Ill. 78, 81-82 (1873) (quoting Blackstone, but holding a public arrest illegal, despite the existence of probable cause, since the suspect was in fact innocent); *McLennon v. Richardson*, 81 Mass. 74, 71 Am. Dec. 353 (1860) (holding warrantless entry of a shop to arrest for liquor and

---

[35]Research has disclosed only one nineteenth century American case which actually deals with a warrantless entry to arrest for felony and in that case there were exigent circumstances. In *Randall's Case*, 5 City Hall Record 141 (N.Y. Court of Oyer and Terminer 1820), the court held that immediately after a "dangerous wounding" an officer could enter a home in order to prevent the suspect's escape. The court made a specific finding that "if the delay was to be incurred, of going for and coming with a warrant, the prisoner might have escaped and public justice have been evaded. . . ." *Id.* at 161. So heavily did the court rely on the exigent circumstances rationale that the case was later cited for the proposition that generally a warrant was necessary for an arrest in the home. 2 O. Barbour, A TREATISE ON THE CRIMINAL LAW AND CRIMINAL COURTS OF THE STATE OF NEW YORK 547 n.28 (3d ed. 1883).

The earliest nineteenth century English case to consider the question was *Davis v. Russell*, 5 Bing. 355, 130 Eng. Rep. 1098 (C.P. 1829) in which the court approved warrantless entries in *dictum*. In that case, the entry of the home was apparently by consent. *Id.* at 356, 365; 130 Eng. Rep. at 1098, 1102. The English authorities we have cited, such as Chitty and Russell, do not seem to have accepted this case as authoritative on when warrantless entries could be made. Indeed, the modern English rule still seems to be in doubt although tending to require a warrant. 1 W. Russell, ON CRIME 672 (J. Turner, ed., 12th ed. 1964).

gambling offenses illegal, because the offenses did not "disturb the public peace"). It is notable that in most cases concerning entries to arrest in this period, the officer actually did have a warrant.[36] This suggests that when a home was to be entered securing a warrant was the usual procedure.

The incentive for officers to obtain warrants is readily apparent. Although the law was confused, a large body of authority held that an officer who failed to get a warrant was absolutely liable in tort for trespass and false imprisonment if the suspect he arrested turned out to be innocent. This was the import of the formula that a warrantless breaking was not justifiable "or must at least be considered as done at the peril of proving that the party . . . is guilty." 1 W. Russell, CRIMES AND MISDEMEANORS, *supra*, at 629. This meant that if the officer mistakenly arrested an innocent person by entering his home, the officer would be strictly liable in money damages in a civil suit. That the officer had probable cause would be no defense. Cf., *Shanley v. Wells*, 71 Ill. 78, 81-82 (1873) (probable cause no defense for mistaken arrest, even in public); *Wakely v. Hart*, 6 Binn. 316, 319 (Pa. 1814).[37]

[36]See, e.g., *Kelsy v. Wright*, 1 Root 83 (Conn. 1783); *State v. Shaw*, 1 Root 134 (Conn. 1789); *Read v. Case*, 4 Conn. 166, 10 Am. Dec. 110 (1822); *Hawkins v. Commonwealth*, 53 Ky. 395, 61 Am. Dec. 147 (1854); *Barnard v. Bartlett*, 64 Mass. 501, 57 Am. Dec. 123 (1852); *Commonwealth v. Irwin*, 83 Mass. 587 (1861); *Commonwealth v. Reynolds*, 120 Mass. 190, 21 Am. Rep. 510 (1876); *State v. Smith*, 1 N.H. 346 (1818); *State v. Mooring*, 115 N.C. 709, 20 S.E. 182 (1894).

[37]In contrast with the plaintiffs in these early cases, a modern plaintiff asserting the same causes of action faces virtually insuperable difficulties in overcoming the various good faith and immunity defenses an officer may interpose. See, e.g., *Thompson v. Anderson*, 447 F. Supp. 584 (D. Md. 1977) (even though officer lacked probable cause to believe suspect was in home, he was not liable for entry and search because of unwritten standard operating procedures approved by the police department permitting such practice).

Thus the rule provided a powerful deterrent against making warrantless arrests in the home, for the officer would pay out of his pocket if he were honestly mistaken and this rule of law applied; if, however, he obtained an arrest warrant, he was insulated from liability for his errors.

As in the eighteenth century, the nineteenth century American common law had not settled whether a home could be entered without warrant to arrest for a felony. Some authorities held that no warrant was necessary, but their reasoning, that the warrant was a matter of "form, not substance," is severely at odds with the modern Fourth Amendment. The opposing rule, that warrants were necessary to insulate an officer from the consequences of his errors, was accepted by many authorities and provided a powerful incentive to officers to secure warrants lest they be held liable in civil actions. The obsolete common law rules of liability thus played a salutary role in insuring that officers sought a magistrate's approval before entering homes. The American common law of the nineteenth century thus provides no basis for exempting entries to arrest from the Warrant Clause of the Fourth Amendment, or to use Mr. Justice Powell's words, this is *not* a case where "logic . . . must defer to history and experience." *United States v. Watson*, 423 U.S. at 429.

C. Modern Courts, Examining Arrest Entries in Light of Fourth Amendment Interests, Have by a Substantial Majority Found Them Subject to the Warrant Requirement.

The first American case ever to approve the warrantless entry of a home to arrest absent exigent circumstances was decided in 1911. *Commonwealth v. Phelps*, 209 Mass. 396, 95 N.E. 868 (1911). While this case remained the

principal authority for some time, by mid-century the right of police to break down doors to arrest was severely questioned. See, *Accarino v. United States*, 179 F.2d 456 (D.C. Cir. 1949). Since then as courts have begun to take account of the governing Fourth Amendment principles, the balance of authority has shifted so that most federal circuits now require warrants for arrests in the home as do the vast majority of states to have considered the issue.

For a period of time at the end of the nineteenth and beginning of the twentieth century the bulk of authority was statutory, and many, but not all, states adopted provisions permitting warrantless arrests in homes.[38] The apparent reasons for passage of these

[38] Only twenty states now have statutes permitting warrantless arrest entries whose validity has gone unquestioned by their state courts. See Ala. Code §15-10-4 (1977); Alaska Stat. §12.25.100 (1972); Ark. Stat. Am. §43-414 (1964); Fla. Stat. Ann. §901.19 (1973); Hawaii Rev. Stat. §803-11 (1972); Idaho Code Ann. §19-611 (1948); Iowa Code Ann. §755.9 (1950); Kan. Code Crim. Proc. §22-2405 (1974); Miss. Code Ann. §99-3-11 (1972); Mo. Ann. Stat. §544.200 (1953); Mont. Rev. Code Ann. §95-602 (1969); Neb. Rev. Stat. §29-411 (1975); Nev. Rev. Stat. §171.138 (1967); N.Y. Crim. Proc. Law §§120.80, 140.15 (1971); N.C. Gen. Stat. §15A-401(3) (1978); N.D. Cent. Code Ann. §29-06-14 (1974); Ohio Rev. Code Ann. §2935.12 (1975); Tenn. Code Ann. §40-807 (1975); Tex. Code Crim. Proc. Art. 15.25 (Vernon 1977); Utah Code Ann. §77-13-12 (1968). Courts in five other states with statutes have seriously questioned their validity or applied exigency analysis without reaching the constitutional question. See *State v. Ranker*, ___ La. ___, 343 So.2d 189 (1977); *People v. Little*, 78 Mich. App. 170, 259 N.W.2d 412 (1977); *State v. Lasley*, 306 Minn. 224, 236 N.W.2d 604 (1975); *State v. Girard*, 276 Ore. 511, 555 P.2d 445 (1976); *State v. Teuber*, 19 Wash. App. 654, 577 P.2d 149 (1978). On the other hand, sixteen states now authorize arrest entries only under warrant. See cases cited *infra* at pp. 57, 58 and Conn. Gen. Stat. Ann. §30-106 (1975); Ga. Code Ann. §27-205 (1972); Ky. Rev. Stat. §70.078 (1971); Okla. Stat. Ann. tit. 22, §194 (1969); S.C. Code Ann. §23-15-60 (1977); Wyo. Stat. Ann. §7-165 (1967). Thus, roughly equal numbers of states, including those whose only authority is statutory, now approve and disapprove warrantless arrest entries.

statutes show that the statutes themselves are irrelevant to interpretation of the Fourth Amendment. First, the statutes arose at a time when even respected commentators held the warrant to be only a matter of form, a view the codifiers probably shared. See, 1 J. Bishop, CRIMINAL PROCEDURE *supra*, at 109 n.6. Second, there was actually less need for a warrant requirement in an age where an officer faced substantial civil liability for an honestly mistaken arrest, for officers were thus deterred from acting in questionable situations. Finally, the codifiers, at least in New York, did not profess to take into account the privacy interests involved, but tried only to have the confusing law of arrest "compressed into a few plain and intelligible directions." *Report of the Select Committee for the Code of Criminal Procedure, New York State Assembly, submitted March 2, 1855*, at 87. Because the drafters of these statutes failed to take account of the role of the warrant in safeguarding Fourth Amendment interests, and because they sought merely to simplify arrest law, the statutes themselves provide no guide to construction of the Fourth Amendment.

With few exceptions, the courts which have examined the need for warrants in light of the Fourth Amendment interests they serve have rejected the old statutory position and have found a warrant requirement. In the federal courts, for example, six circuits now hold that the Fourth Amendment imposes a warrant requirement on entries to arrest,[39] while only

[39] *Dorman v. United States*, 435 F.2d 385 (D.C. Cir. 1969); *United States v. Reed*, 572 F.2d 412 (2d Cir. 1978); *Vance v. North Carolina*, 432 F.2d 984, 990-91 (4th Cir. 1970); *United States v. Killebrew*, 560 F.2d 729 (6th Cir. 1977); *Salvador v. United States*, 505 F.2d 1348, 1351-52 (8th Cir. 1974); *United States v. Prescott*, 581 F.2d 1343 (9th Cir.

(continued)

two do not.[40] The great majority of those state courts which have been called upon to construe the Fourth Amendment in this area have also found warrants required. Thus, ten states now impose a warrant requirement by judicial construction[41] and only one has reached the same result as the New York Court of Appeals.[42]

In short, when courts have examined the propriety of

(footnote continued from preceding page)

1978). It is also significant that no Congressional enactment specifically authorizes warrantless entries to arrest. Compare, *United States v. Watson*, 423 U.S. at 415-16. Congress has repealed a provision of the District of Columbia Code which for a brief time authorized warrantless entries in the District of Columbia. Compare, former D.C. Code §23.591, P.L. 91-358, §210(a), with P.L. §93-481, §4(a); P.L. 93-635, §16. See, *In re R.A.J.*, 24 Cr. L. Rep. 2284 (D.C. Sup. Ct. December 11, 1978) (holding warrant required for arrest of juvenile in home).

[40] *United States v. Williams*, 573 F.2d 348 (5th Cir. 1978); *United States ex rel. Wright v. Woods*, 432 F.2d 1143 (7th Cir. 1970).

[41] *State v. Cook*, 115 Ariz. 188, 564 P.2d 877 (1977); *People v. Ramey*, 16 Cal.3d 263, 545 P.2d 1333, *cert. denied*, 429 U.S. 929 (1976); *People v. Moreno*, 176 Colo. 488, 491 P.2d 575 (1971); *People v. Trull*, ___ Ill. App.3d ___, 380 N.E.2d 1169, 1173 (1978); *Stuck v. State*, 255 Ind. 350, 264 N.W.2d 611 (1970); *Commonwealth v. Forde*, 367 Mass. 798, 329 N.E.2d 717 (1975); *Nilson v. State*, 272 Md. 179, 321 A.2d 301 (1974); *Dent v. State*, 33 Md. App. 547, 365 A.2d 57 (1976); *Commonwealth v. Williams*, ___ Pa. ___, 24 Cr. L. Rep. 2241 (1978); *State v. Max*, 263 N.W.2d 685, 687 (S.D. 1978); *Laasch v. State*, 84 Wisc.2d 587, 267 N.W.2d 278 (1978).

[42] See, *State v. Perez*, 277 So.2d 778, 782-83 (Fla.), *cert. denied*, 414 U.S. 1064 (1973). *People v. Eddington*, 23 Mich. App. 210, 173 N.W.2d 686 (1970), *aff'd*, 387 Mich. 551, 198 N.W.2d 297 (1972) is often cited for this proposition also, but subsequent cases from Michigan throw its validity into some doubt. See, *People v. Burrill*, 391 Mich. 124, 214 N.W.2d 823 (1974); *People v. Little*, 78 Mich. App. 170, 259 N.W.2d 412 (1977).

warrantless arrest entries in light of the concerns of the Fourth Amendment, rather than the concerns of ancient law, they have concluded that they are subject to the warrant requirement. They have found in the Fourth Amendment the very principles which must govern this case:

> To be arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home. This is simply too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is clearly present.

United States v. Reed, 572 F.2d at 423. Because of the substantial privacy invasion involved, and because, unlike the common law, the Fourth Amendment values the warrant as the chief safeguard of privacy, warrants are required for entries of the home to arrest.[43]

[43] Although we have demonstrated above that the common law of arrest affords no support for the decision below, we note that the common law is not, in general, determinative of Fourth Amendment issues. In the most fundamental areas of Fourth Amendment jurisprudence, indeed, the Court has rejected the approach of the common law. In *Warden v. Hayden*, 387 U.S. 294, 300-10 (1967), for example, the Court rejected the common law view of what property was subject to seizure, and held, contrary to the early precedents, that "mere evidence" could be seized. Similarly, in defining the scope of a "search" under the Fourth Amendment, the Court in *Katz v. United States*, 389 U.S. 347, 352-53 (1967) repudiated the view of *Olmstead v. United States*, 277 U.S. 438 (1928) that eavesdropping involved no search because there was no common law trespass. See, Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 381-82 (1974). Other common law rules of arrest law such as the "knowledge-suspicion" distinction or the misdemeanor warrant rule, appear never to have been absorbed into the Fourth Amendment. See, *United States v. Watson*, 423 U.S. 411, 455 n.21 (1976) (Marshall, J., dissenting); *Agnello v. United States*, 269 U.S. 29, 33 (1925).

V. No Exigent Circumstances Existed to Excuse the Failure of the Police to Obtain a Warrant Prior to their Breaking Open the Door to Payton's Apartment.

If our argument is correct that a warrant is required for entry to arrest within the home, then such a requirement can be dispensed with only upon a determination that there were exigent circumstances excusing the failure of the police to obtain one. *Coolidge v. New Hampshire,* 403 U.S. at 454-455; *Katz v. United States,* 389 U.S. at 357-58. Six of the seven judges below were of the view that no exigency was present in the *Payton* case. Only Judge Wachtler, who dissented on other grounds (A. 82-85), felt that such circumstances existed because the crime involved was a homicide and "for several days the police had been in continuous pursuit of the killer when they arrived at the defendant's apartment . . ." (A. 82).[44] This conclusion

[44]The prosecution, while arguing below that under the circumstances of this case the officers' entry into Payton's apartment met the constitutional standard of "reasonableness," also insisted that the record did not afford a basis for determining whether or not there existed exigent circumstances. This assertion is based on a claim that the prosecution was not permitted the opportunity to demonstrate what happened between the time Detective Malfer first went to Payton's address on January 14 and the time he returned on the morning of January 15. See, Appellee's Motion to Defer Consideration, (filed with this Court) pp. 21-28. However, the record created no problem for resolution of the issue in the court below. The majority opinion states definitively that there were no exigent circumstances (A. 69, 74) and the opinions of both Judges Wachtler and Cooke, while differing, show a full exploration of the question (A. 81-82, 92-93). Moreover, at the suppression hearing, the prosecutor was fully aware that the warrant requirement was in issue (A. 8) and that if there were exigent circumstances, it was the prosecutor's burden to establish them. *Mc Donald v. United States*, 335 U.S. 451, 455-56 (1949). Not only did he choose not to do so, he objected to defense counsel's inquiry as to whether Detective Malfer had acquired any additional information during the interval between his visits to Payton's apartment (A. 34).

is neither consistent with this Court's elucidation of the exigent circumstances doctrine nor supported by the facts of this case.

In describing the circumstances under which the warrant requirement of the Fourth Amendment may be dispensed with, the Court has emphasized that there must be "exceptional circumstances," or a "grave emergency," and that the burden is upon "those who seek exemption from the constitutional mandate [to demonstrate] that the exigencies of the situation made that course imperative." *Mc Donald v. United States*, 335 U.S. 451, 454-456 (1949).

Thus, exigent circumstances have been found to exist where there was danger of flight [*Johnson v. United States*, 333 U.S. at 15], where there was danger of imminent destruction of evidence [*Schmerber v. California*, 384 U.S. 757, 770-71 (1966)], where the search was incident to a lawful arrest [*Chimel v. California*, 395 U.S. 752], or where the police were in "hot pursuit" of a suspect. *Warden v. Hayden*, 387 U.S. at 297-99; see, also, *Vale v. Louisiana*, 399 U.S. 30, 35 (1970). Nothing remotely resembling these exigencies is present in this case.

That Payton was sought for a homicide did not, of itself, create any exigency. In rejecting Arizona's purported "homicide-scene" exception to the warrant requirement, the Court specifically declined "to hold that the seriousness of the offense under investigation itself creates exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search." *Mincey v. Arizona*, 57 L.Ed.2d at 301.

Moreover, despite the nature of the crime, the facts demonstrate that the police themselves perceived no

need to act as though speed were essential. See, *Warden v. Hayden, supra*, 387 U.S. at 299. Detective Malfer knew Payton's identity and address the day before the break-in. He had been taken to Payton's apartment sometime after noon on January 14, 1970. By that time, he knew precisely what crime Payton was accused of and he was aware of all the facts which established probable cause. Despite that knowledge, he made no immediate attempt to arrest Payton nor did he arrange to keep Payton's apartment under surveillance. Since he did not return to Payton's home until the next morning, Malfer had the remainder of the day and evening of the 14th to obtain a warrant.

Having bypassed one opportunity to get a warrant, Malfer did so a second time the following morning. When he returned to Payton's apartment with four other police officers, they had to delay their entry further until other officers from the Emergency Services Division could arrive to assist in breaking through Payton's door. According to Malfer, all avenues of escape were so well covered that he had not the slightest concern that Payton would escape during the time it would take Emergency Services to respond. If, as Malfer maintained, the situation was sufficiently well in hand that the additional delay was of no particular moment, then there was no urgent need to forego this further opportunity to obtain a warrant, even if it would have required a slightly longer delay. See, *United States v. Jeffers*, 342 U.S. 48, 52 (1951) ("the officers admit they could have easily prevented any such destruction or removal by merely guarding the door"); *United States v. Calhoun*, 542 F.2d 1094, 1102 (9th Cir. 1976), *cert. denied*, 429 U.S. 1064 (1977)

("The availability of an alternative further suggests that exigent cicumstances did not exist. There were sufficient officers in the area that, instead of entry, they might have maintained surveillance while a warrant was sought."). Consequently, the amount of time which the police allowed to pass between the time they acquired probable cause and their entry into Payton's apartment demonstrates that it was not the exigencies of the situation which precluded their obtaining a warrant. See, *G.M. Leasing Corp. v. United States*, 429 U.S. at 358-59. Since the heart of the Fourth Amendment is the command that absent exigent circumstances a person's home may be invaded only after a determination by a neutral magistrate, the entry into Payton's apartment was unreasonable.[45]

---

[45]Because the District Attorney has conceded that there was no exigency in *Riddick*, we treat the subject only briefly and merely to underscore the basis for that concession and to illustrate that obtaining an arrest warrant would have been no hindrance whatsoever to the police. Riddick had been living at the same address for two years, as his parole officer undoubtedly knew. The crime for which he was arrested had occurred years before. Under these circumstances there was no danger of sudden escape or destruction of evidence. The actions of the police confirm the lack of exigency, for even after ascertaining Riddick's address they waited weeks to make the arrest. In cases like Riddick's, the requirement that police obtain a warrant for an entry places absolutely no burden upon them. They may seek it as soon as they have probable cause to arrest or only at the last minute. Since the police have ample time to obtain the warrant, the delay involved in getting it does not hinder them, and their failure to do so is inexcusable.

VI. The Extreme Force Employed to Gain Entry to Payton's Apartment, in the Absence of Exigent Circumstances, Constitutes an Additional Ground for Holding the Conduct of the Police Unreasonable Under the Fourth Amendment.

We have argued above that a warrant to arrest within the home is required by the Fourth Amendment for any non-consensual entry when there are no exigent circumstances. In the *Payton* case, however, the police entry was not only non-consensual, it was also forcible. The extreme force employed by the police to gain entry to his apartment constitutes a further basis for holding that Payton's Fourth Amendment rights were violated.

The primary argument of the Court of Appeals, in rejecting a construction of the Fourth Amendment which would require warrants in cases such as appellant Payton's, was that the intrusion on the home in such cases is less than the intrusion of a search. With regard to Payton's case, and to all cases where force is used to effect entry, the court's conclusion is manifestly false. The forcible breaking of a door is a far greater intrusion than the search because of the very violence it entails.

Because of the magnitude of this instrusion, the element of force has been specifically adverted to as a factor which might merit special treatment. *United States v. Santana*, 427 U.S. 38, 43-44 (1976) (White, J. concurring); *Coolidge v. New Hampshire*, 403 U.S. at 511 n.1 (White, J., concurring and dissenting, joined by Burger, C.J.); *Jones v. United States*, 357 U.S. at 499-500. There is sound basis for such concern. As Professor Amsterdam has observed, "[i]ndisputably,

forcible entries by officers into a person's home or office are the aboriginal subject of the Fourth Amendment and the prototype of the 'searches' and 'seizures' that it covers." Amsterdam, *Perspectives on the Fourth Amendment, supra*, 58 Minn. L. Rev. at 363.

At common law, there was considerable discussion about the "extremity" of the breaking down of doors, and the view was stated that "the breaking an outer door is, in general, so violent, obnoxious, and dangerous a proceeding, that it should be adopted only in extreme cases, where an immediate arrest is requisite." R. Burn, JUSTICE OF THE PEACE 303 (30th ed. 1869), quoted in *Accarino v. United States*, 179 F.2d at 461; see, e.g., 1 J. Chitty, CRIMINAL LAW 52 (3rd Am. ed. 1836) ("extreme violence"); 1 W. Russell, CRIMES AND MISDEMEANORS 629 (5th Am. ed. 1845) ("this extremity"); 1 E. East, PLEAS OF THE CROWN 322 (1803) ("this extremity").

As we have earlier pointed out (*supra*, n.26) the term "breaking" at common law was broad enough to encompass a wide variety of non-consensual entries. That in no way detracts, however, from the obvious concern with those breakings which were of the more violent nature and indeed left the suspect's family open to the elements. See, *Lee v. Gansel*, 1 Cowp. 1, 6, 98 Eng. Rep. 935, 938 (1774) where Lord Mansfield, discussing breakings to execute a warrant, wrote:

> The ground of this; that otherwise the consequences would be fatal for it would leave the family within, naked and exposed to thieves and robbers. It is much better therefore, says the law,

> that you should wait for another opportunity, than do an act of violence, which may probably be attended with such dangerous consequences.

The element of force has also been a factor which a number of states[46] have thought sufficiently important to justify imposition of the warrant requirement, as have a number of courts. See, e.g., *Accarino v. United States*, 179 F.2d 456; *Commonwealth v. Forde*, 367 Mass. at 807, 329 N.E.2d at 723 ("Additional considerations testing the reasonableness of police conduct are whether the entry is peaceable and whether the entry is in the nighttime.").[47] And as the Chief Justice, then Judge Burger has written, " 'a forcible entry into a house is justified only when an immediate major crisis in the performance of duty affords neither time nor opportunity to apply to a magistrate.' " *Chappell v. United States*, 342 F.2d 935, 938, n.5 (D.C. Cir. 1965), quoting from *District of Columbia v. Little*,

[46]Conn. Gen. Stat. Ann. §30-106 (1975) (only into disorderly house); Ga. Code Ann. §27-205 (1972); Ky. Rev. Stat. §70.078 (1971); Okla. Stat. Ann. tit. 22, §194 (1969); S.C. Code Ann. §53-198 (1977); Wyo. Stat. Ann. §7-165 (1967).

[47]The American Law Institute has proposed that a warrant be required for forcible entries but only for "nighttime" entries, i.e. those undertaken between the hours of 10 p.m. and 7 a.m. ALI, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, §120.6 (1975). At least one commentator has criticized the arbitrariness of such a provision and further pointed out that "the intensity of the intrusion is a function of more than the lateness of the hour of entry." Haddad, *Arrest, Search and Seizure—Six Unexamined Issue in Illinois Law*, 26 DePaul L. Rev. 492, 526-27 (1977). This case demonstrates the wisdom of that criticism. Forcible entry of Payton's apartment was attempted initially between 7:15 and 7:30 a.m., some fifteen to thirty minutes too late to qualify, under the ALI proposal, as a "nighttime" entry. But the force employed was far more critical to the degree of the intrusion than the passing of a few minutes and must be accorded far greater weight.

178 F.2d 13, 17 (D.C. Cir. 1949).

The force employed in this case, the breaking open of an apartment door with crowbars, was of course extremely severe. Had anyone been inside and awakened from a deep sleep, the noise of metal on metal, the locks being strained and broken, and the final burst of the officers entering would have been a terrifying experience.[48] The sudden entry of officers might then incite forcible resistance from an otherwise compliant occupant. The actual property destruction involved and the potential for further violence dictate that such actions be subject to procedural restraints. Regrettably, there arise circumstances in which the police must use force to enter a home in the interest of public safety. However, when there is no exigency, the decision to employ violent methods should not be left to their unfettered discretion. It follows that when the sanctity of the home is to be abruptly intruded upon with the kind of force applied in this case, such intrusion should be predicated upon the authorization of a neutral magistrate.

In such cases, for the reasons we have discussed above, that requirement places no burden upon the police; indeed some police departments have a stated policy of obtaining a warrant where an arrest will require a forcible entry. W. LaFave, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 45 (1965). Their reason for such a policy is that they themselves

[48]At an early hour of the morning, the failure to answer an apartment door cannot be conclusive proof that no one is within. Indeed, in this case, it is less than clear that the police gave notice of their authority and purpose, as Malfer testified only that he had knocked on the door (A. 13-14).

believe it confers positive benefits: "because police entry into private homes is undoubtedly one of the most sensitive of all law enforcement practices, the warrant serves the very important function of insulating the police from criticism by giving the appearance that they have selected 'that legal course which conforms most to democratic values.' " *Id.* at 45-46. Because no exigent circumstances justified a warrantless entry into Payton's apartment, the violent nature of the entry constitutes an additional basis for the conclusion that Payton's Fourth Amendment rights were violated.

CONCLUSION

For the above reasons, the judgment of the Court of Appeals upholding New York's statutory provisions authorizing warrantless, non-consensual and forcible entries into private dwellings should be reversed.

Respectfully submitted,

WILLIAM E. HELLERSTEIN
DAVID A. LEWIS
Counsel for Appellants

January, 1979